

UNITED STATES OF AMERICA,)
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 Plaintiff,)
)
 vs.) **CRIMINAL NO. 06-30058-GPM**
)
 DAVID E. JENKINS, JR.,)
)
 Defendant.)

circumstances of this case – specifically, where the state conviction was simply used to calculated Defendant’s criminal history.

“A post-judgment motion needs a source of authority for the judge to act,” “for once a criminal case ends in a sentence the judge’s power lapses.” *United States v. Scott*, 414 F.3d 815, 816 (7th Cir. 2005). As noted by the Government, Defendant actually appears to be seeking relief under 28 U.S.C. § 2255. The Seventh Circuit Court of Appeals has repeatedly held that a postconviction motion that is functionally a § 2255 motion should be treated as such, regardless of how it is labeled. *See, e.g., Carter v. United States*, 312 F.3d 832, 833 (7th Cir. 2002). It also is clear that the district court must warn a defendant before treating the postconviction motion as such to allow him an opportunity to withdraw it because, with limited exceptions, the Antiterrorism and Effective Death Penalty Act, which governs collateral attacks on criminal judgments, gives a prisoner only one chance at postconviction review. *Id.*

Accordingly, Defendant is allowed until **March 10, 2008**, to withdraw his motion. If he does not do so, the motion, which is substantively within the scope of § 2255, will be treated as such. Notably, should Defendant decide to proceed with his motion, he will be confronted with the waiver provision contained in his plea agreement, which provides, in relevant part: Defendant “knowingly and voluntarily waives his right to contest any aspect of his conviction and sentence that could be contested under Title 18 or Title 28” (Doc. 20, pp. 11-12 at ¶ 2).

IT IS SO ORDERED.

DATED: 02/19/08

s/ G. Patrick Murphy
G. Patrick Murphy
United States District Judge